IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1010 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DINESH KUKABHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1010 of 1998

MR BS SUPEHIA for Appellant

Mr N D Gohil, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 23/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

This is an appeal under section 374 (2) of the Criminal Procedure Code, 1973 (for short, 'the Code') filed by the appellant-original accused in Sessions Case No.49/97 before the learned Addl.Sessions Judge at Surendranagar. The appellant was convicted by the said Court for offences punishable under section 302 of IPC as well as under section 135 of the Bombay Police Act. He was sentenced to suffer R.I. for life and was directed to pay fine of Rs.500/- for offence under section 302 of IPC. In default of payment of fine, he was required to undergo S.I. for three months.

2. For offence under section 135 of the Bombay Police Act, the appellant was sentenced to suffer S.I. for four months. He was directed to pay Rs.100/- and in default of payment of fine, he was required by the said Court to further undergo S.I. for seven days.

3. The substantive sentence was ordered to run concurrently.

The facts of the case of the prosecution against the appellant may be briefly stated as follows:

The appellant and the deceased were residents of village Raisangpar in Halvad Taluka of Surendranagar District. It seems that the deceased had some illicit relationship with the mother of the appellant. The father of the appellant has passed away and the appellant was a young person of about 19 years at the relevant point of time. On account of the aforesaid illicit relationship, the appellant tried to pursue the deceased in order to see that the deceased did not visit his place. However, the deceased did not accept the said request of the appellant and insisted that he would visit the house of the appellant.

4. On 24.2.1997 at about 10.30 p.m., there was some exchange of words between the appellant and the deceased. The appellant requested the deceased not to visit his place. The deceased did not agree with it and conveyed that he would definitely visit the house of the appellant and the appellant was at liberty to do what he could. At this stage the appellant got angry and dealt dharia blows on the head of the deceased. The deceased fell on the ground and succumbed to the injuries.

5. An FIR was lodged and investigation was started. The dead body of the deceased was taken to the hospital and the Doctor had carried out post mortem examination of the dead body of the deceased. The appellant was

arrested, inquest panchnama was drawn. Panchnama relating to the scene of offence was drawn. Statement of other witnesses were recorded, muddamal article was seized, FSL report was obtained and at the conclusion of the investigation the Police Sub-Inspector submitted charge-sheet against the present appellant before the learned Judicial Magistrate First Class at Halvad.

6. Since the offence punishable under section 302 of IPC is exclusively triable by a Court of Sessions, the learned Magistrate committed the case against the appellant to the Court of Sessions. There the case was registered as Sessions Case No.49/97.

7. Learned Addl.Sessions Judge ascertained that the copies of police investigation papers were supplied to the appellant. Charge was prepared and framed against the appellant at Exh.33. It was read over and explained to the appellant. The appellant pleaded not guilty to the said charge. Therefore, the trial court recorded evidence produced by the prosecution against the appellant.

During the course of the hearing on the framing of charge, the trial court found that there was material to show that the appellant had consumed illicit liquor without pass or permit. Therefore, offence under section 66(1)(b) of the Bombay Prohibition Act, 1949 was also framed against the appellant.

8. During the course of evidence, the prosecution has examined following witnesses:

PW 1 Devshibhai, brother of the decd. Exh.11
PW 2 Kishorebhai Exh.13
PW 3 Rameshbhai Thakorsibhai Exh.14
PW 4 Mavjibhai Kukabhai, brother of decd. Exh.15
PW 5 Shamjibhai Dhanabhai Exh.16
PW 6 Hirjibhai Narsibhai, Panch Exh.17
PW 7 Sukhdevsingh Dilavarsingh Exh.19
PW 8 Zalamsingh Bhupatsingh Exh.21
PW 9 Gangaram Bhikhabhai Exh.23
PW 10 Rajendrasingh Anandsingh Exh.24
PW 11 Dr.Babulal Tribhovandas Exh.34
PW 12 Kantilal Gokulbhai, Circle Inspector Exh.38
PW 13 Ranjitbhai Parmar, witness Exh.42
PW 14 Halubha Mulubha, Head Constable Exh.44
PW 15 Natwarsingh Jilubha, PSI Exh.46

The prosecution also produced certain documents which may be referred as follows:

FIR Exh.12
Panchnama - muddamal bed sheet of mother of the appellant Exh.22
Panchnama - Discovery of muddamal dharia Exh.26
" scene of offence Exh.27
" on muddamal clothes of the decd. Exh.28
Copy of FSL report Exh.29
" onwards
Post mortem note Exh.36
Medical certificate of examination of the appellant Exh.37
Map Exh.40
Notification issued by the District Magistrate Exh.43
Police station diary entry Exh.45
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9. On conclusion of the evidence, the learned trial Judge recorded further statement of the appellant. The circumstances appearing in evidence against the appellant were put to him and he was afforded an opportunity to explain the same. Thereafter arguments advanced on behalf of both the parties were heard. Thereafter the trial court found that the appellant had intentionally caused the murder of the deceased and he was found in possession of a dharia in a public place and, therefore, he had committed offence under section 302 of IPC and under section 135 of the Bombay Police Act. Therefore, the trial court convicted the appellant for the said two offences and sentenced him as aforesaid.

10. However, the trial court found that the prosecution had not proved that the appellant had consumed illicit liquor and, therefore, the trial court acquitted the appellant of the offence under section 66(1)(b) of the Bombay Prohibition Act,

11. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant has preferred this appeal before this court. It has been mainly contended here that there was no sufficient material to hold the appellant guilty of the offence in question. That there was evidence of solitary witness who had not whole-heartedly supported the case of the prosecution and, therefore, the trial court should have ignored the said evidence while convicting the appellant. That the conviction against the appellant is otherwise illegal. That the trial court has committed serious illegality in convicting the appellant, that therefore,

the judgment and conviction order are illegal and deserve to be quashed and set aside.

12. In the alternative, it has been contended that even if the prosecution evidence is accepted, the prosecution has failed to prove that the appellant had intentionally committed murder of the deceased and, therefore, the appellant could not have been convicted for offence punishable under section 302 of IPC.

13. On receiving the appeal, it was ordered to be admitted and since the bail was not pressed, there was no question for the Court to consider the said prayer.

The appeal was placed at the stage of final hearing. At this stage, Mr B S Supehia, learned Advocate has represented the appellant whereas Mr N D Gohil, learned APP has appeared on behalf of the State. Both of them have argued the matter at a great length. They have taken us through the evidence on record both oral and documentary. They have also taken us through the observations made by the trial court during the course of the judgment.

14. Since this is a case of an alleged murder of a deceased, it would be necessary to first consider if the prosecution has proved on record whether the deceased died a homicidal death. On this aspect of the case, this Court finds evidence of Medical Officer, Dr.Babulal Malavpura at Exh.34 who has deposed before the trial court that he has received the dead-body of the deceased on 25.2.1997 at about 7.30 a.m. and that he had started post mortem examination and concluded it at 9.a.m. This Medical Officer ahs also deposed before the trial court that the deceased had suffered five incised wounds on different parts of the head. The description given in evidence as well as in the post mortem note at column 17 clearly indicates that there were 5 incise wounds on the head of the deceased. The evidence relating to the internal examination also indicates that there were corresponding injuries noticed by the Medical Officer when the internal examination was undertaken by him. He has also opined that the deceased died of haemorrhage and shock. This witness has further deposed that the deceased had died on account of injuries sustained by him on the public road near the house of the witness. There was no serious dispute before the trial court that the deceased had a homicidal death. Thet rial court was therefore, justified in holding that the deceased died a homicidal death. This finding of the trial court is therefore, confirmed.

15. The next question is whether the deceased had intentionally murdered by the present appellant.

In order to appreciate the said position, there is the evidence of Rameshbhai, PW 3 at Exh.14. This witness has very clearly stated that the appellant and the deceased had some sort of exchange of words. He has further stated that it was at night hours. He also deposed that during the course of exchange of words, the appellant had gone to his house and returned to the spot with dharia in his hand. That the appellant dealt five blows by means of dharia on the head of the deceased. That on account of the said blows, the deceased fell on the ground and succumbed to the injuries. He has further stated that shouts were raised by him and many other persons had gathered together on the spot.

16. In fact, he is the only witness who had witnessed the incident. The other witnesses had come to the spot on hearing the shouts. The evidence of this witness is supported by the evidence of Devshibhai, who happened to be the brother of the deceased. He has also deposed that on the night of the incident they heard shouts and, therefore, they rushed to the spot and saw that the deceased was lying on the floor. He had injuries on his head and the deceased succumbed to the injuries on the spot itself.

17. Therefore, this evidence of this witness clearly supports the evidence of the eye witness. This witness has filed FIR wherein the aforesaid incident has been described in full length. The said FIR Exh.12 clearly supported the evidence of Joshi and the evidence of the said witness and the FIR corroborates the case of the prosecution and of the aforesaid eye witness.PW 2, Kishorebhai Exh.13 is also a witness who had reached the spot on hearing the shouts. During the examination-in-chief, he tried to say that the was witness to the incident. However, in the cross-examination, he has deposed that he had not seen the appellant hitting blows on the deceased but it was seen by Ramesh and Mavji. He has further deposed that when the blows were dealt by the appellant on the deceased, he was sleeping at his house. He has further deposed that when he reached the spot, certain witnesses and the appellant were present. This makes it clear that Kishorebhai Exh.13 was not an eye witness but he learnt about the incident when it was conveyed to him by the aforesaid eye witness.

18. PW 4, Mavjibhai Exh.15 has been examined as eye witness. However, he has turned hostile and he has not supported the case of the prosecution. He being the brother of the deceased, has naturally not supported the case of the prosecution. However, it appears from his cross-examination, that he did pose himself to be an eye witness when the investigation was going on. Shamjibhai, PW 5 at Exh.16 was President of the Taluka Panchayat. He has stated that he had learnt about the incident and he communicated it to the police station on phone. Other witnesses are not eye witnesses.

19. The learned advocate for the appellant has argued that the evidence of the aforesaid eye witness is not acceptable and, therefore, the Court should ignore the evidence of the said witnesses.

Now it is very clear that Rameshbhai at exh.14 has given details as to how the incident took place. It is further required to be considered that other witnesses who have reached the spot on hearing shouts, have also been consistent about the presence of the witness. The incident has taken place very near to the house of the witness. Looking to the nature of his evidence and looking to the fact that he stood the test of cross-examination and his evidence has not shaken to any extent during the cross-examination, it is very clear that the evidence of this witness has been accepted by the trial court, and once the evidence of this witness has been accepted and it is found to have been supported by other witnesses, then in that event, it is difficult to hold that the appellant had not committed any offence and he had not dealt blows on the head of the deceased. It is true that there is a little sort of contradiction in the evidence of Rameshbhai at Exh.14. This witness has deposed that the appellant had come out with dharia and at that time, he had covered himself by means of blanket. During the course of police station statement, he had deposed that the appellant had covered himself by means of bed sheet. This is not a major contradiction on account of which this court can discard his evidence. There is no other contradiction in his evidence.

20. Looking to the evidence on record as stated hereinabove, it is clear that the evidence of the eye witness is required to be accepted and this court finds no difficulty in accepting the same. It is more so, when he is a natural eye witness and his evidence is supported by evidence of other witnesses who have proved his presence at the spot. It is also required to be considered that the FIR has been filed without any loss

of time and there also the name of this witness has been clearly disclosed as an eye witness. Therefore, it cannot be said that there is some improvement or concoction or that the name of this witness was subsequently introduced as an eye witness. Even otherwise, the aforesaid witnesses have also deposed that they had seen the appellant running away from the spot. This fact also lends corroboration to the testimony of the aforesaid eye witness. In that view of the matter, the learned Advocate for the appellant could not convince this court on the point that the appellant was not present when the offence was committed and he did not commit any offence. This court is of the view that the appellant was present at the time when the offence was committed and that he dealt blows by means of dharia on the head of the deceased. This factual aspect has been held to have been proved by the trial court and this court also finds that the trial court was justified in accepting the said evidence in holding that the appellant had dealt five blows by means of dharia on the head of the deceased at the date and time and place referred to hereinabove.

21. We also find evidence of recovery of clothes at Exh.18. Exh.17 is a panch witness in whose presence clothes of the appellant was seized. He has deposed before the trial court that the clothes of the deceased were seized in his presence and they were stained with blood. Evidence of this witness is supported by panchnama Exh.18, the contents of which have been proved by the aforesaid witness.

22. There is also an evidence of PW 10 Rajendrasingh at Exh.24. He is a witness to the discovery of muddamal dharia which was discovered by the appellant. The contents of the panchnama at Exh.26 have been proved by this witness and on a combined reading of the evidence of this witness and the said panchnama, it has become clear that the appellant had voluntarily discovered muddamal dharia which was also stained with blood. Then we find evidence of FSL at Exh.30 onwards. This report shows that muddamal clothes seized from the person of the appellant and muddamal dharia discovered by the appellant all were found stained with blood. It was further opined that it was also found to be of the blood group 'O'. It is not much in dispute that this was the blood group of the deceased. This shows that the blood containing blood group of the deceased was found on the clothes of the appellant and also on the dharia discovered by him. The appellant has not explained as to how the said blood was found on his person and on the dharia discovered by him.

Presence of the said blood having blood group of the deceased on the person of the appellant also lends corroboration to the case of the prosecution that the appellant had dealt dharia blows on the deceased and in the process, the said blood had sprinkled on the person of the appellant.

23. In view of the aforesaid overwhelming evidence, this Court finds that it was the appellant and the appellant alone who had dealt dharia blows on the head of the deceased.

On the strength of the aforesaid evidence, the trial court has found that the appellant had committed offence punishable under section 302 of IPC holding that the appellant had intentionally caused murder of the deceased. Here the learned Advocate for the appellant has argued at length that even if the Court finds that the appellant had dealt dharia blows on the head of the deceased, then also it would not amount to an offence punishable under section 302 of IPC. His argument is that the deceased had illicit relationship with the mother of the appellant and, therefore, the appellant had requested the deceased not to visit his house. This fact has come on record.

24. We can find from the evidence of Devshibhai Exh.11 that the deceased had illicit relationship with the mother of the appellant. It is required to be considered that the aforesaid fact has come on record in the examination-in-chief itself. Therefore, it cannot be said that a new fact was introduced by the witness for the first time at the stage of trial. When the aforesaid fact has come on record, through the evidence of the aforesaid witness at Exh.11 and when there was no cross-examination on this aspect of the case, then in that event, the said evidence is required to be accepted as it stands.

25. It is true that this may provide a motive for the appellant to commit the offence in question. At the same time, it also provides an opportunity to the appellant to plead some sort of defence also. It is required to be considered that according to the evidence of this witness, there was illicit relationship between the mother of the appellant and the deceased. Naturally, no son would like his widow mother having illicit relation with a stranger. It is more so when the mother of the appellant was a middle aged woman whereas the deceased was hardly 19 years of age at the relevant point of time. Therefore, the appellant, as per the evidence of this

witness at exh.11, requested the deceased not to come to his house. Naturally, if the deceased would not go to the house of the appellant, then there would be no relation between the mother and the deceased. Therefore, with a view to overcome the said shameful position, the appellant requested the deceased not to come to his house. On hearing the said request from the appellant, the deceased had replied that he would continue to come to the house of the appellant. At this stage, the appellant got angry and excited and he brought a dharia and dealt blows with dharia on the head of the deceased.

26. At this stage, it is required to be considered that on account of the aforesaid hot exchange of words, sudden and grave provocation was given rise of by the deceased to the appellant. It can be inferred that the appellant had justification in extending the request to the deceased not to come to his house.

27. At this stage, the learned APP has argued that there was some time lag between the first episode of exchange of words and the second episode in which the appellant has caused injuries to the deceased. He has, therefore, argued that since there was cooling time, this court must hold that the appellant had dealt dharia blows on the deceased not as a consequence of the aforesaid hot exchange of words. He has, therefore, argued that the case would continue to fall under Section 302 of IPC and the exceptions found in section 300 of IPC would not come to the rescue of the appellant.

28. At this stage, it is required to consider that the appellant has been coming from a socially and educationally backward class. When there was an illicit relationship between the appellant's mother and the deceased, naturally the appellant did not like it. It is more so, when the relationship was going on in his house itself. He must have been found himself to be in an embarrassing position also. Sometimes such relationships would put the members of the family in awkward position. Therefore, there would be continuous mental torture on the part of the members of the family when such relationship is going on in their house itself. It is more so when the appellant belongs to socially and educationally backward class. Therefore, looking to the said background and looking to the culture inherited by him, it can be said that the appellant found that there was a continuous mental torture extended to him on account of the said relationship between the deceased and the mother of the appellant.

29. In this aspect of the case, we may refer to an observation made by the Hon'ble Supreme Court in the case of K M Nanavati v. State of Maharashtra v. State of Maharashtra, reported in AIR 1962 SC 605. The said observation may be reproduced for ready reference hereunder:

> "The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to section 300. The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

30. In the present case, we find that there was hot exchange of words between the appellant and the deceased on account of the aforesaid illicit relations between the deceased and the mother of the appellant. Considering the aforesaid background, it may be inferred that the appellant received sudden grave and sudden provocation at the hands of the deceased. The appellant was very much angry and excited as the deceased did not accept his request and persisted that he would continue to visit the house of the appellant. Therefore, it seems that the appellant lost control and balance of his mind and, therefore, he rushed back to his residence, brought a dharia and started inflicting blows one after the other on the deceased. It requires to be considered that even a single blow or two would have caused death of the deceased as the blows were inflicted by means of dharia and they were inflicted on vital organ of the deceased like head. The appellant did not stop there. He continued to hit the head of the deceased by means of dharia and in all five blows were inflicted. This clearly shows that the appellant was greatly provoked by the said gesture and words of the deceased and since he could not control himself, he dealt those blows.

31. In view of the aforesaid position, it has to be

accepted that the appellant did not act with an intention of causing murder of the deceased. But looking to the aforesaid background, it has to be held that the act of the appellant is amounting to culpable homicide and not amounting to murder.

32. At this stage, it is required to be considered as to whether the said act would fall within four corners of part I of section 304 of IPC or it would fall within four corners of Part II of the said section.

On a bare reading of section 304 of IPC, it becomes clear that if the act by which death is caused either with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, then the offence is punishable with imprisonment for life or with imprisonment which may exceed upto 10 years.

33. On the other hand, the offence would fall within four corners of Part II of the said section, if the act is done with the knowledge that it is likely to cause death but there is no intention to cause it or to cause such bodily injury as was likely to cause death.

The question would arise is as to whether the act of the appellant could be treated to be an act with intention or with knowledge. Having regard to the background of the case referred to above, this court finds that it was a clear case of intention on the part of the appellant and, therefore, the case would fall within four corners of section 304 Part I of IPC as alternatively suggested by the learned Advocate for the appellant.

34. In above view of the matter, this court finds that the prosecution has proved that the appellant has caused the death of the deceased but at the same time, looking to the surrounding circumstances and particularly the fact that the deceased had illicit relations with the mother of the appellant and considering the fact that the appellant had requested the deceased not to come to his house and the deceased not only rejected such request but insisted that he would visit the house of the appellant. It has to be accepted that the appellant caused death of the deceased with an intention to cause his death within four corners of section 304 Part I of IPC. Therefore, this Court finds that the appellant is not proved to be guilty of offence under section 302 of IPC but the Court

finds that the prosecution has proved that the appellant is guilty of offence under section 304 Part I IPC. In hat view of the matter, when the offence proved against the appellant is one punishable under section 304 Part I IPC, the punishment for the said offence is imprisonment for life or imprisonment which may extend upto 10 years.

35. It is true that five blows were dealt on the person of the deceased with dharia by the appellant. At the same time, looking to the cause which provoked the appellant and looking to the fact that the appellant was hardly 19 years of age at the time when the offence was committed, this Court found that ends of justice would meet if the appellant is required to suffer R.I. for 10 years.

36. Therefore, this court holds that the appellant is guilty of offence punishable under section 304 Part I of IPC. He should be required to suffer R.I. for 10 years. So far as the offence under section 135 of the Bombay Police Act is concerned, the appellant has been found to be guilty and has been sentenced to suffer R.I. for four months. On this aspect of the case, the prosecution has proved that there was notification in force at the relevant point of time prohibiting carrying of arms in a public place. The appellant was found with dharia in a public place. On this factual aspect, notification Exh.43 proves that there was prohibition against carrying weapons in public place. In that view of the matter, when the appellant was found with dharia in public place, the trial court was justified in holding him guilty of the said offence and in convicting him for the said offence, the punishment ordered is not very harsh and when it is required that the two substantive sentences which are to run concurrently, this court does not find any ground to interfere with the sentence and quantum of punishment imposed on the appellant. So far as offence under section 66(1)(b) of the Bombay Prohibition Act is concerned, the appellant has been convicted and therefore, this court is not required to deal with the said offence in absence of any acquittal appeal.

37. For the foregoing reasons, the appeal is partly allowed. The appellant is ordered to be convicted for an offence punishable under section 304 Part I of IPC and he is sentenced to suffer R.I. for 10 years. He is also directed to pay a fine of Rs. Five hundred and in default of payment of fine, he is directed to suffer further S.I. for three months. The conviction and

sentence imposed by the trial court with respect to the offence punishable under section 135 of the Bombay Police Act stands confirmed and the appeal is dismissed with respect thereto.

The appellant is ordered to be acquitted of the offence punishable under section 302 of IPC. Substantive sentences in the aforesaid two offences to run concurrently. This Court finds no necessity to interfere with the order of disposal of the muddamal articles. Hence, the muddamal articles shall be disposed of in terms of the order of the trial court. The appeal is allowed partly to the extent indicated above.

[J M Panchal, J]

[D P Buch, J.]

msp